Supreme Court, U.S.
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No. 98-2058

In The
Supreme Court of the United States

R.M.S. TITANIC, INCORPORATED, successor in interest to Titanic Ventures, limited partnership,

Petitioner,

v.

CHRISTOPHER S. HAVER; DEEP OCEAN EXPEDITIONS,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Reply to Briefs in Opposition

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15 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

ARGUMENT 1

I. INTRODUCTION 1

II. RESPONDENTS' ATTEMPTS TO EXPLAIN AWAY CLEAR CONFLICTS BETWEEN THE DECISION BELOW AND THIS COURT'S JURISPRUDENCE ARE INEFFECTIVE 1

Grounds for Non-Party Jurisdiction 1

Dicta 2

Due Process Considerations 4

Representation of Non-Parties' Interest 5

Possession or Control of Res 6

III. THE ALL WRITS ACT APPLIES TO RESPONDENTS 7

IV. RESPONDENTS' ATTEMPTS TO LIMIT THIS COURT'S JURISDICTION IN ADMIRALTY AND MARITIME MATTERS ARE WITHOUT SUPPORT 7

V. RESPONDENTS ARGUE THAT COURTS SHOULD NOT RESTRICT ACCESS TO SHIP WRECKS IN INTERNATIONAL WATERS 9

CONCLUSION 9

TABLE OF AUTHORITIES CITED

PAGE

CASES:

Amstar Corp. v. The Alexandros T.,
664 F.2d 904 (1981) 4, 5

Cerro Metal Prods. v. Marshall,
620 F.2d 964 (3rd Cir. 1980) 4

Crowell v. Benson, 285 U.S. 22 (1932) 8

Marex Titanic v. Wrecked and Abandoned Vessel,
805 F.Supp. 375 (E.D.Va. 1992), *rev'd*,
2 F.3d 544 (4th Cir. 1993) 9

Merchants Nat.Bank v. Dredge Gen.G.L. Gillespie,
663 F.2d 1338 (5th Cir. 1981), *cert dismissed*
456 U.S. 966 (1982) 2

Miles v. Apex Marine Corp.,
498 U.S. 19 (1990) 7

Romero v. International Term. Co.,
358 U.S. 354 (1959) 8

United States v. International Bhd. Of Teamsters,
907 F.2d 2771 (2nd Cir. 1990) 7

Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n.,
443 U.S. 658 (1979) ..... passim

Wolf v. Meister-Nieberg, Inc.,
194 Ill.App.3d 727, 551 N.E.2d 353
(Ill.App.1 Dist. 1990) 4

OTHER:

A Dictionary of Modern Legal Usage
275 (2nd ed. 1995) 4

Norris, 3A *Benedict on Admiralty* § 1 (7th ed. 1997) 2

ARGUMENT

I. INTRODUCTION

Respondents seek to write out of existence this Court's recognition of *in rem* injunctions. Respondents also seek to obscure the questions presented in the Petition by raising issues unnecessary to the Court's treatment of those questions. Respondents further contend that public policy is best served by allowing anarchy to reign at wreck sites located in international waters, and they seek to minimize the significant safety risks associated with salvage activities at such wreck sites.

II. RESPONDENTS' ATTEMPTS TO EXPLAIN AWAY CLEAR CONFLICTS BETWEEN THE DECISION BELOW AND THIS COURT'S JURISPRUDENCE ARE INEFFECTIVE

Grounds for Non-Party Jurisdiction

Respondents have mischaracterized this Court's opinion in *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n.*, 443 U.S. 658, 692 n.32 (1979). Respondents argued that the nonparty fishermen were subject to *in rem* injunctions because they were citizens of the State of Washington and therefore subject to jurisdiction there. Deep Oceans Expeditions and Christopher S. Haver ("DOE") Opp. at 7; Alfred S. McLaren, Ph.D., Don Walsh, Ph.D., and Ralph White ("MWW") Opp. at 19.[1] In

[1] Petitioner notes that "Respondents" MWW failed to participate in the proceedings of the district court, despite having received timely notice. Although their counsel filed an *amicus curiae* brief with the court of appeals, the brief was actually filed on behalf of The Explorers Club. Therefore, MWW seeks to participate now, for the first time, by filing a separate brief in opposition to the Petition.

fact, this Court's opinion in *Washington* **first** stated the following two alternative grounds (wholly unrelated to their citizenship) for subjecting the nonparty fishermen to jurisdiction: 1) because nonparties who interfere with the implementation of court orders establishing public rights may be enjoined,[2] and 2) because a court possessed of the res in a proceeding *in rem*, such as one to apportion a fishery, may enjoin those who would interfere with that custody. **After** citing these two rules as the basis for its holding, the Court then noted: "[b]ut in any case, these individuals and groups are citizens of the State of Washington, which was a party to the relevant proceedings, and `they, in their common public rights as citizens of the State, were represented by the State in those proceedings, and, like it, were bound by the judgment.'" *Id.* This language makes clear that there are three separate, and independently supportable, reasons for subjecting the nonparty fishermen to jurisdiction. Therefore, contrary to Respondents' assertion, since the first two reasons cited by the Court for subjecting the fishermen to jurisdiction were unrelated to their citizenship, it follows that they were subject to the court's jurisdiction regardless of whether they were citizens of Washington.

Dicta

Respondents also assert that, in *Washington*, the two reasons expressed by the Court for subjecting the nonparty fishermen to jurisdiction, were dicta. DOE Opp. at 7. However, the Court's own language in the *Washington* opinion makes clear that the reasoning was not dicta. The

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[2] The public rights here involve determinations of property rights against the whole world, as well as assuring that historically and archaeologically responsible salvage takes place. Indeed, "the saving of imperiled maritime property" is and always has been in the public interest. Norris, 3A *Benedict on Admiralty* § 1 (7th ed. 1997); App. 77; *see Merchants Nat.Bank v. Dredge Gen.G.L. Gillespie,* 663 F.2d 1338, 1348 (5th Cir. 1981), *cert dismissed* 456 U.S. 966 (1982).

Court stated that "[i]n addition to their challenges to the District Court's basic construction of the treaties, and to the scope of its allocation of fish to treaty fishermen, the State and the commercial fishing association have advanced two objections to various remedial orders entered by the District Court." *Id.* at 692. The footnote immediately after that sentence begins by noting that "[t]he associations advance a third objection as well – that the District Court had no power to enjoin individual nontreaty fishermen, who were not parties to its decisions, from violating the allocations that it has ordered." *Id.* at 692 n.32. The Court stated: "[t]he commercial fishing organizations, on behalf of their individual members, argue that they should not be bound by these orders because they were not parties to (although the associations all did participate as *amici curiae* in) the proceedings that led to their issuance." *Id.*

The Court went on to state that even though the Washington Attorney General represented to the Court that the State would implement the decision of the Court, "the issue is still alive since state implementation efforts are now at a standstill and the orders are still in effect." *Id.* The Court then concluded "[a]ccordingly, we must decide it." *Id.* It was then that the Court said: "[i]n our view, the commercial fishing associations and their members are probably subject to injunction under either the rule that nonparties who interfere with the implementation of court orders establishing public rights may be enjoined [citation omitted], or the rule that a court possessed of the res in a proceeding *in rem*, such as one to apportion a fishery, may enjoin those who would interfere with that custody. [citation omitted]." *Id.*

Dictum (plural of *dicta*) is a shortened form of *obiter dictum*, which means "a nonbinding, incidental opinion on a point of law given by a judge in the course of a written opinion delivered in support of a judgment." On the other hand *judicial dictum* is that "which refers to an opinion by a court on a question that is directly involved, briefed, and

argued by counsel, and even passed on by the court, but that is not essential to the decision." A Dictionary of Modern Legal Usage 275 (2nd ed. 1995); *see Cerro Metal Prods. v. Marshall*, 620 F.2d 964, 978 n.39 (3rd Cir. 1980). The Court in *Washington* stated that it was presented with a question that it "must decide ...." *Washington*, 443 U.S. at 692 n.32. Therefore, the treatment of the *in rem* injunction issue was clearly not *obiter dictum*, and was at the very least *judicial dictum*, which is generally binding. *Cerro*, 620 F.2d at 978 n.39; *Wolf v. Meister-Nieberg, Inc.*, 194 Ill.App.3d 727, 551 N.E.2d 353, 355 (Ill.App.1 Dist. 1990).

Due Process Considerations

Relying on constitutional due process considerations, the Respondents argue that the district court could not issue *in rem* injunctions prohibiting individuals from interfering with the salvage rights awarded in the wreck. DOE Opp. at 8-9; MWW Opp. at 20. The courts and Congress have long recognized that maritime law differs from the common law. *Amstar Corp. v. The Alexandros T.*, 664 F.2d 904 (1981). Congress recognized this distinction when it granted this Court the authority to promulgate maritime procedure rules. *Id.* at 908. The procedures set out in Supplemental Admiralty Rule C for *in rem* arrest provide a means for enforcing a maritime lien. The lien is an aspect of substantive, rather than procedural, maritime law. *Id.* Furthermore, the constitutionality of Rule C must be determined in the light of the "nautical background from which it evolved" and with proper regard for the substantive maritime law it serves. *Id.* at 909.

The *Amstar* court recognized that the fundamental requisites of due process are adequate notice and the opportunity to be heard. *Id.* at 910. The court recognized that it "need not take refuge in the fiction that the vessel is assumed to be a person," and stated that the "personification of the vessel, long accepted in admiralty, should not blind a

court to reality." *Id.* at 911. Since the arrest has an economic effect on the owner, it is the owner who is entitled to adequate notice. *Id.* In the present case, notice was provided by publication, and the only ownership claim asserted was later dismissed.

The *Amstar* court also noted that constitutional notice requirements were not an obstacle to enforcement of Rule C's *in rem* arrest provisions. The court stated that "the answer to this question is found in the substantive law of admiralty which gives a maritime lienor sufficient interest in the vessel to detain it so his lien can be judicially enforced." *Id.* The court then found that Rule C satisfies the requirements of the due process clause, stating that notice prior to arrest would, in many instances, enable the owner to frustrate judicial enforcement of the lien, and therefore the execution of the process by arrest of the vessel is proper. *Id.* Once the arrest is accomplished, the arresting court must be able to issue orders preventing interference with its exercise of jurisdiction over the wreck. That is precisely what the district court did in this instance by issuing an injunction to prevent interference with its adjudication of the pending *in rem* proceeding. When the issuance of that injunction order is considered "in the light of the nautical background from which it evolved and with due regard to the substantive maritime law it serves," the inescapable conclusion is that the court must be able to issue orders to protect its *in rem* jurisdiction and to carry into effect its orders entered in the *in rem* proceeding.

Representation of Non-Parties' Interest

The Respondents also seek to distinguish the facts of this case from *Washington* by arguing that the nonparties in *Washington* were fully represented by a defendant in the proceedings. DOE Opp. at 8. The Respondents appear to have forgotten that Haver fully defended the matter in the district court, and that the same attorney representing him

then proceeded to represent DOE and Haver at the appellate court and here. Moreover, it was DOE's expedition to the wreck in which Haver sought to participate. Therefore, DOE's interests were fully and adequately represented. Even if DOE's interests were not fully represented, the *Washington* opinion provides separate grounds (as discussed above) for its holding.

Possession or Control of Res

Respondents' argue that the injunction at issue does not target activity that would interfere with the district court's possession or control of the *res*. DOE Opp. at 8. However, the district court recognized the need for protection of the salvor from interference from the very beginning. The district court recognized that the existence of dangerous conditions at the wreck site (total darkness, profound depths and great water pressure), and the need for sophisticated technology to reach and view the wreck site, made it undesirable for sightseers to visit the wreck without regard for and deference to the plan of salvage, implemented by the salvor, especially ongoing salvage activities. The district court also recognized that uninformed sightseers would disturb the wreck site, App. 68-69, 84, and this danger is further highlighted by the fact that the previous photographic exhibitions to the wreck by the P.P. Shirshov Oceanographic Institute created dangerous conditions for submersible passengers and caused damage to the wreck itself. In fact, during the 1996 expedition, RMST discovered the propeller protector of one of the two P. P. Shirshov *MIR* submersibles lodged in the wreck. App. 69 n. 11.

III. THE ALL WRITS ACT APPLIES TO RESPONDENTS

The Respondents argue that the All Writs Act does not apply in this case because there is no jurisdiction over them. DOE Opp. at 9. However, this argument ignores the holding of this Court in *Washington*. The Respondents argue that the All Writs Act may not be used to circumvent the Due Process Clause, and they cite *United States v. International Bhd. Of Teamsters*, 907 F.2d 277, 281 (2nd Cir. 1990) in support of that argument. However, a close reading of *International Bhd. Of Teamsters* reveals that there is no conflict. In that case, the court simply stated "all we hold is that if jurisdiction over the subject matter of and the parties to litigation is properly acquired, the All Writs Act authorizes a federal court to protect that jurisdiction even though non-parties may be subject to the terms of the injunction." *Id.*

Assuming, as we must, that the *International Bhd. Of Teamsters* court was aware of this Court's holding in *Washington*, there can be no conflict between the two rulings. Accordingly, since this Court described, in *Washington*, how proper jurisdiction over the parties can be acquired in cases like this, there is no bar to application of the All Writs Act.

IV. RESPONDENTS' ATTEMPTS TO LIMIT THIS COURT'S JURISDICTION IN ADMIRALTY AND MARITIME MATTERS ARE WITHOUT SUPPORT

It is surprising that Respondents cite to *Miles v. Apex Marine Corp.*, 498 U.S. 19, 31-33 (1990) for the proposition that federal courts are not authorized to determine the bounds of salvage rights. DOE Opp." at 6. In *Miles*, 498 U.S. at 31, this Court specifically reiterated that it is appropriate for federal courts to supplement federal admiralty law, as long

as Congress has not spoken directly to the question. This same proposition was recognized by this Court in *Romero v. International Term. Co.*, 358 U.S. 354, 360-61 (1959). In discussing the power conferred upon the Supreme Court in Article III of the Constitution, the Court stated that:

> Article III impliedly contained three grants. (1) It empowered Congress to confer admiralty and maritime jurisdiction on the "Tribunals inferior to the supreme Court" which were authorized by Art. I, § 8, cl. 9. (2) It empowered the federal courts in their exercise of the admiralty and maritime jurisdiction which had been conferred on them, to draw on the substantive law "inherent in the admiralty and maritime jurisdiction," *Crowell v. Benson*, 285 U.S. 22, 55, and to continue the development of this law within constitutional limits. (3) It empowered Congress to revise and supplement the maritime law within the limits of the Constitution. *See Crowell v. Benson, supra,* at 55.

Romero, 358 U.S. at 360-61.

This Court has also recognized that the exact kind of question here presented is appropriate to federal courts. In *Romero* the Court noted that Section 9 of the First Judiciary Act granted the District Courts maritime jurisdiction, and that "it was recognition of the need for federal tribunals to exercise admiralty jurisdiction that was one of the controlling considerations for the establishment of a system of lower federal courts." *Id.* The Court also noted that, in The Federalist, No. 80, Hamilton wrote that "[t]he most bigoted idolizers of State authority have not thus far shown a disposition to deny the national judiciary the cognizances of maritime causes" which "so generally depend on the laws of

nations, and so commonly affect the rights of foreigners, that they fall within the considerations which are relative to the public peace" and the "most important part of them are, by the present Confederation, submitted to federal jurisdiction." *Id.* at 361, f.n. 8. Therefore, it is appropriate for this Court to determine the bounds of salvage law.

V. RESPONDENTS ARGUE THAT COURTS SHOULD NOT RESTRICT ACCESS TO SHIP WRECKS IN INTERNATIONAL WATERS

The Respondents argue that the public benefits by having unfettered access to shipwrecks lying in international waters. MWW Opp. at 25. This myopic view ignores the likelihood of looting of shipwrecks and the significant risk of confrontation on the high seas. Indeed, RMST has already dealt with one such confrontation in which the district court enjoined another diving group from interfering with RMST's efforts. App. 82. Also, while Respondents note the existence of only five manned submersibles capable of reaching the wreck, they fail to advise the Court that numerous commercial enterprises operate unmanned remotely operated vehicles (ROV) which are capable of reaching, photographing and salvaging the wreck.[3]

CONCLUSION

The Respondents fail to grasp the essential point of the Petition. The district court issued its injunction in an ongoing *in rem* proceeding. In that proceeding, the district court recognized that portions of the wreck had been brought before it; required notice to the world of its intention to hear claims to the wreck; adjudicated ownership to the wreck,

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[3] The district court enjoined a salvage operation to the wreck, employing just such an ROV, in September, 1992. *See Marex Titanic v. Wrecked and Abandoned Vessel*, 805 F.Supp. 375, 377 (E.D.Va. 1992), *rev'd*, 2 F.3d 544 (4th Cir. 1993).

conditioned on continuing salvage activities (as the law of salvage requires); conferred a status – that of salvor in possession – on the petitioner; and issued orders to protect the exercise, at the wreck site, of all rights emanating from salvor in possession status. The district court's decision conformed to generally accepted principals of international salvage law and served to protect a salvor who was acting in a responsible manner, appropriate to the historical and cultural significance of the wreck. The court of appeals failed to fully recognize the wisdom of the district court's decision. The decision of the court of appeals, if it stands, will result in piecemeal litigation around the world, presenting the risk of inconsistent results. It was for this reason that Professor Thomas J. Schoenbaum recently stated in his hornbook on admiralty law, at Section 16-7, pg. 337, that:

> There is a growing consensus that U.S. courts should assume jurisdiction over shipwrecks in international waters. Extraterritorial jurisdiction is justified on the basis that this is the only way to preserve wrecks that are often of extreme historic interest from plunderers, to protect the right of the first salvor, and to return the property concerned to economic usefulness.

The district court recognized these risks and conferred a status subject to review and modification, dependent on the prosecution of continuing salvage activities. The district court's decision to protect the status using an *in rem* injunction is appropriate under the circumstances and *in personam* jurisdiction should not be necessary to protect the status.

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